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No. 84-482

Supreme Court, U.S.
FILED
JAN 8 1985
ALEXANDER L. STEVAS
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1984

KEITH H. GUSTAFSON,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

REPLY BRIEF ON CERTIORARI

NEAL R. LEWIS
1899 South Bayshore Drive
Miami, Florida 33133
(305) 854-0050
Attorney for Petitioner

Of Counsel:
JAMES M. SHELLOW
STEPHEN M. GLYNN
Shellow, Shellow & Glynn, S.C.
222 East Mason Street
Milwaukee, Wisconsin 53202
(414) 271-8535

STEPHEN A. SALTZBURG
Professor of Law
University of Virginia
School of Law
Charlottesville, Virginia 22901

UNITED STATES LAW PRINTING CO., CHICAGO, ILLINOIS 60618 (312) 525-6581

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ARGUMENT IN REPLY

Petitioner raises one basic claim in his petition for certiorari: Marihuana offenses may not be used as predicate crimes to convict a defendant of violations of the federal racketeering statute, 18 U.S.C. §§1961, 1962 ("RICO").

The petition for certiorari examines the language of the racketeering statute and its legislative history and argues that neither the language nor the background of the statute supports application of RICO to marihuana offenses. The Brief for the United States in Opposition is more remarkable for what it ignores than for what it states. The response essentially ignores the background of the statute, invites this Court to depart from the plain language chosen by Congress, and suggests that the Court should permit the statute to reach marihuana offenses because the purpose of the statute would be furthered by such a construction.

The United States seeks to have this Court write for Congress a statute that Congress never enacted, one that it purposely sought to avoid. A brief review of the state of the law prior to RICO's enactment in 1970, and of its legislative setting, is necessary to appreciate the background of RICO that the United States would have this Court ignore.

I. THE LAW PRIOR TO 1970

Prior to 1970, Congress enacted legislation which punished three categories of drug offenses: narcotic drugs, marihuana, and depressant or stimulant drugs. There was no doubt that Congress distinguished narcotic drugs from marihuana and that it distinguished both of these substances from all other dangerous drugs regulated by federal law. The United States does not dispute this in its brief in opposition.

There is also no doubt that Congress was aware that it had given special definitions to, and made special provision for, narcotics and marihuana that distinguished them from all other dangerous drugs. For this reason, in 1968 when Congress enacted Title III of the Omnibus Crime Control and Safe Streets Act, 18 U.S.C. §§2510-2520 (1970), it specified that among the crimes that could be investigated using electronic surveillance were offenses "involving . . . the manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in narcotic drugs, marihuana, or other dangerous drugs, punishable under any law of the United States." The choice of the language was significant and intentional. It reflected the understanding of Congress that marihuana and narcotic drugs were different from all other dangerous drugs and the Congressional intent to include all three categories of drugs within the reach of the new statute governing electronic surveillance. The United States does not dispute this in its brief in opposition.

II. THE 1970 STATUTES

Congress in 1970 considered two bills at virtually the same time. One bill, the Comprehensive Drug Abuse Prevention and Control Act of 1970, 21 U.S.C. §§801-966 (1970), revamped federal drug law. The other bill was the racketeering statute, which is the focus of attention in this petition. It was enacted within weeks of the enactment of the drug reform statute. No understanding of RICO is complete without consideration of the drug reform legislation.

During its consideration of the drug reform statute, Congress referred to three categories of drug offenses: those involving narcotic drugs, those involving marihuana and those involving other dangerous drugs. *See, e.g.*, penalty chart in H. Rep. No. 91-1444, 91st Cong., 2d Sess., *reprinted in* 1970 U.S. Code Cong. & Ad. News 4566, 4640. The brief in opposition does not challenge this.

In the drug statute as enacted, Congress chose the term "controlled substances" to cover all drugs falling within the statute. At the same time Congress specifically provided that narcotic drugs and marihuana would have their own separate definitions, even though they fell within the broader term "controlled substances." Congress also made provisions of the new statute applicable to narcotic drugs and marihuana that were not applicable to all other drugs falling within the broader term. This is not disputed by the United States.

In the 1970 drug legislation, Congress defined some offenses as covering all controlled substances. *See, e.g.*, 21 U.S.C. §844 (1970) (possession of controlled substance). The definitions of other offenses specified activities relating to "narcotic drugs, marihuana, or depressant or stimulant substances." *See, e.g.*, 21 U.S.C. §841(b)(1)(A), (B); (b)(2), (b)(3). This is not disputed by the United States.

One major section of the new legislation covered only marihuana. In 21 U.S.C. §841(b)(4) (1970), Congress established that a person who violated federal law "by distributing a small amount of marihuana for no remuneration shall be treated" as a misdemeanant. The thrust of the legislation was that distribution of small quantities of marihuana was to be treated differently from distribution of any other controlled substance. The United States does not dispute this.

The same Congress that chose to carry forward in the 1970 legislation the definition of marihuana which distinguished it from other controlled substances, and that chose to make special provision for small gratuitous distributions of marihuana, enacted RICO. This Congress chose not to use the term "controlled substance" in the RICO legislation, despite the fact that it was readily available and had been frequently used in the Controlled Substances Act. As recently noted, "members of Congress who voted for the RICO statute were aware of the Controlled Substances Act." *Russello* v. *United States*, 104 S.Ct. 296, 301 (1983). Instead, Congress provided that racketeering activity included only offenses "involving . . . buying, selling, or otherwise dealing in narcotic or other dangerous drugs."

III. THE IMPORTANCE OF CONGRESS' ACTION

The United States argues that Congress viewed the reference to marihuana as surplusage. Marihuana is a drug whose use can be dangerous; accordingly, so the argument goes, it is a "dangerous drug" within the RICO definition of "racketeering activity." 18 U.S.C. §1961(1) (1970). This argument is a facile equation of "dangerous drug" as a legislative category with "dangerous drug" as a descriptive term. Even after two extensions of time to

respond to the petition for certiorari, the United States cites not a single aspect of the legislative history in support of its argument.

Instead, the United States offers a one-sentence comment from the 1967 testimony of an Assistant Customs Commissioner in hearings before the House Committee on Government Operations[1] to suggest that Congress was concerned with marihuana as well as with other drugs. Brief for United States, at page 7. Of course, there can be no doubt that Congress was concerned about marihuana activity. Concern is evident in the inclusion of marihuana among the substances subject to federal prosecution. The question raised in the petition for certiorari, however, is not whether Congress was generally concerned about marihuana, but whether Congress intentionally and with good reason excluded marihuana from the reach of RICO.

The plain language of the RICO statute suggests that Congress did intend to exclude marihuana. As noted above, Congress could have used the term "controlled substance," but it did not. Congress could have followed the language of the 1968 electronic eavesdropping statute,[2] but it consciously chose not to use this language. Since Congress demonstrated in the drug reform legislation that it knew how to include all drugs in a statutory provision when it desired to do so, the plain language of RICO would suggest

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[1] The RICO legislative hearings were not held before this subcommittee but rather before the Subcommittee on Criminal Laws and Procedures of the Senate Committee on the Judiciary in 1969.

[2] This was the recommendation of the author of RICO, Professor G. Robert Blakey, and also was the suggestion of Deputy Attorney General Richard Kleindeinst. Petition for Certiorari, at page 8. Since Professor Blakey was also "the draftsman of the bill containing the basic outline of Title III," *United States* v. *Giordano*, 416 U.S. 505, 518 & n.7 (1974), it must be presumed that Congress was aware of the language used in Title III.

that the same Congress meant to do what it did—*i.e.*, eliminate marihuana from the scope of the statute.

Professor Blakey, the principal drafter of RICO, has described the exclusion of marihuana as a deliberate decision by Congress:

> Note, there are no [federal] marijuana RICO prosetions. . . . [The statute includes] narcotics and other dangerous drugs; it does not include marijuana. I don't know that everybody's noticed that, but the . . . language is such that you cannot infer that marijuana is a dangerous drug [under] RICO. There are no federal RICO marijuana prosecutions. There may be some state ones, but there's not going to be any federal ones, and that was a conscious policy choice by the Congressmen involved.

Blakey, *Materials on RICO: Criminal Overview*, 1 Techniques In The Investigation Of Organized Crime 24 (Cornell Institute on Organized Crime, Blakey ed. 1980) (bracketed material and ellipses in original).[3]

If the plain language and the legislative history of both pieces of 1970 legislation are ignored, as the United States would ignore them, the result is a totally perverse statutory scheme. This Court would be forced to conclude that the same Congress that intended to remove felony penalties for gratuitous distributions of marihuana, and to sanction such distributions as misdemeanors only, also desired to

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[3] Blakey's statement was made years before this issue was raised in any court of appeals. He was not acting as an advocate, but was instead simply lecturing on RICO's history and application to the 1979 Cornell Institute on Organized Crime Summer Program on Labor Racketeering. Blakey's position remains today as stated in 1979. Indeed, he has repeated this view before the Eleventh Circuit in an of-counsel capacity to one of the appellants in *United States v. Bascaro*, 742 F.2d 1335 (11th Cir. 1984), and he will maintain it before this Court on the certiorari petition to be submitted in that case on behalf of Russell Hobson III.

give federal prosecutors the power to punish as racketeers those who made gratuitous distributions.

Predicate offenses under the racketeering statute include offenses involving narcotic drugs and other dangerous drugs that are felonies under state law. 18 U.S.C. §1961(1)(A) (1970). Virtually every state punished marihuana distribution, even small gifts, as a felony in 1970. Thus, a reading of RICO that includes marihuana as a dangerous drug requires the conclusion that Congress wanted to punish as racketeers the very persons whom it had treated as misdemeanants in the drug reform statute. Surely such a reading would be mistaken.

In its brief in opposition the United States makes an argument for which it offers no supporting authority and which it chooses not to explain. At page 7, n.5, the United States appears to argue that petitioner lacks standing to highlight the absurdity of concluding that Congress intended to permit gratuitous distributors of marihuana to be prosecuted as racketeers, because petitioner was not himself a gratuitous distributor of small quantities of marihuana. Petitioner's purpose, however, is not to argue that he was a gratuitous distributor, but to demonstrate why Congress deliberately removed marihuana from the coverage of RICO.

Moreover, Congress has now made specific provision in the drug laws for large scale marihuana trafficking by providing that such trafficking may result in enhanced punishment. 21 U.S.C. §841(b)(6) (1980).[4] This special

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[4] Under the United States' theory, large scale marihuana trafficking has been encompassed within RICO, with its 20-year imprisonment penalties, since 1970. Yet, in 1980, when Congress enacted §841(b)(6), it did so because "sophisticated trafficking networks" involved in "large scale marihuana trafficking" were subject to a maximum 5-year prison sentence under "[c]urrent law." S. Rep.

(footnote continued)

punishment statute provides further evidence that when Congress wants to reach marihuana activities, it says so in an unmistakable fashion.

Recognizing that RICO applies only to felonies, the United States boldly claims that the foregoing perverse effects of including marihuana within RICO would not occur, because gratuitous distributions of marihuana are not felonious. *See* Brief at page 7, n.5. No legal or factual authority is offered in support of the assertion, and it is demonstrably wrong. RICO applies to state drug felonies, 18 U.S.C. §1961(1) (1970), and at the time RICO was enacted, these distributions were state drug felonies.[5] In fact, until the enactment of the drug reform statute in the same year, they were also felonies under federal law.

The government's final point, in the single footnote it offers the Court to help it interpret RICO, is that a gratuitous distributor of another drug—*e.g.*, methamphetamine, the government suggests—would fall within the racketeering statute. The government apparently believes that the distinction between marihuana and other drugs is unjustifiable. However, this is not a judgment for the executive branch nor for the judiciary; it is a

(footnote continued)

No. 96-916, 96th Cong., 2d Sess. 14, *reprinted in* 1980 U.S. Code Cong. & Ad. News 2858, 2871. When this amendment was discussed in the House, its sponsors recognized that present penalties were inadequate for dealing with "[c]riminal organizations trafficking in large amounts of marihuana." 126 Cong. Rec. 11791 (1980). Presumably, a network or organization so involved would constitute a RICO enterprise, and those associated with it would be prosecutable under 18 U.S.C. §1962(c) (1970)—yet, at no time, either in the Senate or the House, did anyone suggest that RICO could be applied to those networks or organizations.

[5] *See, e.g.*, state statutes collected in The President's Commission on Law Enforcement and Administration of Justice, *Task Force Report: Narcotics and Drug Abuse*, Appendix B at 129 n.480 (1967).

Congressional judgment, and the plain fact is that Congress provided in 21 U.S.C. §841(b)(4) that gratuitous distributions only of marihuana would receive special treatment.

IV. THE IMPORTANCE OF THE ISSUE

Petitioner asks this Court to review an important question of federal law. He has demonstrated in his petition that the court of appeals declined to examine the background of the RICO statute in holding that marihuana offenses fall within it. Instead, the court of appeals cited only two cases. The first, *United States* v. *Smith*, 574 F.2d 308 (5th Cir.), *cert. denied*, 439 U.S. 931 (1978), did not even consider the question whether marihuana offenses fell within RICO. The defendant in that case simply assumed that they did and made only a double jeopardy argument. The second case, *United States* v. *Phillips*, 664 F.2d 971 (5th Cir. 1981) (Unit B), *cert. denied*, 457 U.S. 1136 (1982), disposed of the argument that marihuana was not a narcotic or dangerous drug by citing only *Smith* in the one paragraph devoted to the argument.

Petitioner asks only for a fair hearing on an important question. He unsuccessfully sought en banc consideration from the court of appeals so that it could, for the first time, examine the background of the RICO and drug reform statutes. In subsequent cases, the court of appeals has indicated that it will continue to cite *Phillips* and follow it. *See, e.g., United States* v. *Bascaro*, 742 F.2d 1335, 1342-43 (11th Cir. 1984).[6] As noted in the petition, the government continues to charge marihuana offenses as predicate acts in racketeering cases. The importance of the issue presented in the petition is obvious. If petitioner is correct, surely it would be better to have the issue resolved

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[6] The *Bascaro* panel acknowledged the force of this legislative history argument but held it was "foreclosed by *United States* v. *Phillips*" and was "not at liberty" to reconsider the issue. 742 F.2d at 1343.

sooner rather than later. Early resolution would spare the federal courts from hearing RICO cases that will result in convictions that later will be overturned,[7] will protect defendants from standing trial on improper RICO charges, and will enable the government to substitute proper charges for the improper RICO charges.

The issue is purely one of law, and all the law that is relevant now exists. It is doubtful that further consideration by lower courts will provide insights not available at this time.

For these reasons, petitioner respectfully prays that this Court grant his petition for certiorari and set the case for briefing and argument.

Respectfully submitted,

NEAL R. LEWIS
1899 South Bayshore Drive
Miami, Florida 33133
(305) 854-0050
Attorney for Petitioner

Of Counsel:
JAMES M. SHELLOW
STEPHEN M. GLYNN
SHELLOW, SHELLOW & GLYNN, S.C.
222 East Mason Street
Milwaukee, Wisconsin 53202
(414) 271-8535

STEPHEN A. SALTZBURG
Professor of Law
University of Virginia
School of Law
Charlottesville, Virginia 22901

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[7] As noted earlier, a petition is presently being prepared on behalf of at least one of the appellants in *United States* v. *Bascaro*. Although the Eleventh Circuit denied en banc consideration, it stayed mandate to allow submission of a certiorari petition raising this issue.